OCT 8 1943
CHARLES ELMORE CROPLEY
CLERK

320 US #1
ABR-ATL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 415

MEYER ABRAMS, HARRY J. MYERSON AND FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,

Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MEYER ABRAMS,
HARRY J. MYERSON,
H. WALTER STEWART,
Attorneys for Petitioners.

SHULMAN, SHULMAN & ABRAMS,
134 North LaSalle Street,
Chicago, Illinois,
HARRY J. MYERSON,
10 South LaSalle Street,
Chicago, Illinois,
THOMPSON, HINE & FLORY,
Guardian Building,
Cleveland, Ohio,
Of Counsel.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

PAGE

Statement of the Matter Involved 2-4

The Questions Presented 4

Reasons for Allowance of the Writ..... 5-6

Prayer for Relief 7

Brief in Support of Petition 8-47

A. Jurisdiction Invoked 8

B. Opinions Below 8

C. Argument 9

SUMMARY OF ARGUMENT.

Statement of the Case 9-17

I.

The approval of the Master's Report without notice and without a hearing as required by Rule 53 (e) 2 required a reversal of the order overruling the objections, and to sustain the objections..... 17

II.

The District Court was required to examine the evidence on ruling on the objections which were based on the contention that there was no evidence to suspend the Master's findings. It was the duty of the Court of Appeals to reverse the order, which was the result of a failure to examine the evidence and to hear the argument 20

139651

III.

The findings were contrary to the uncontroverted evidence, and the Circuit Court of Appeals clearly erred in not reversing the order sustaining the Master's Report 21

IV.

The affirmance of the denial of the reimbursement of a part of the expenses cannot be sustained on any theory 46

TABLE OF CASES.

A. B. Co., In re, 15 Fed. Supp. 152..... 27
Denver & R. G. W. R. Co., 32 Fed. Supp. 244, 245..... 6
Ecker v. Western Pac. R. Co., 318 U. S. 448..... 47
Ettman v. Federal Life Ins. Co., 137 F. (2d) 121..... 6
Foote Bros. et al. v. Nat'l Land Bank, 114 F. (2d) 611 20
Garden City Canning Co. v. Addy, 116 F. (2d) 137..... 27
Gochenour v. Morgan, et al., 111 F. (2d) 378.....26, 47
Gochenour v. Cleveland Terminals Bldg. Co., 118 F. (2d) 89 26
Holt v. Johnson, 128 N. C. 67..... 20
Harrison v. Commissioner, 107 F. (2d) 341.....6, 18
Miller v. Tobin, 18 Fed. 609..... 18
Mofflein Chemical Corp., In re, 123 F. (2d) 311..... 27
Missouri Utilities Co. v. City of California, 14 F. Supp. 613 33
New York, N. H. R. R. Co., 46 F. Supp. 236..... 47
Perry v. Baumann, 122 F. (2d) 409..... 18
R. F. C. v. Bankers Trust Co., 318 U. S. 163..... 5
Rosenberg v. Heffron, 131 F. (2d) 80..... 6
Securities Exchange Commission, 84 F. (2d) 316..... 6
Shannon v. Retail Clerks Int. P. Assn., 128 F. (2d) 553 18
State v. Millohols, 195 N. W. 292..... 6
Taylor v. Standard Gas & Electric Co., 306 U. S. 307.. 46
West Chicago Park Comrs. v. Riddle, 151 Ill. 487.... 18

RULE CITED.

Rule 53 (e) 2..... 17

In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943.

No.

MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN, Executrix of the Estate of Joseph L. Stern, Deceased,

Petitioners,

v.

CLEVELAND TERMINALS BUILDING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioners, Meyer Abrams, Harry J. Myerson and Fannie B. Stern, Executrix of the Estate of Joseph L. Stern, Deceased, hereby petition for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, whose judgment was made final on August 31, 1943, when it denied a rehearing from its decision of May 31, 1943, affirming the judgment below.

STATEMENT OF THE MATTER INVOLVED.

The subject-matter of this petition involves the construction of Federal Rules 52 (a) and 53 (e) 2, and the effect of non-compliance with Rule 53 (e) 2 on the application of Rule 52 (a).

The District Court refused to grant the petitioners a "hearing" as required under Rule 53 (e) 2 when it overruled their objections to the report of a special Master, without notice, without opportunity to be heard, and without examining the evidence, notwithstanding the fact that the objections were filed on the ground that the report was not sustained by any evidence in the case and that demand was made for a "hearing" on the face of the objections.

The Court of Appeals applied Rule 53 (e) 2 in affirming the decision below (requiring it not to disturb the judgment below unless it was "clearly erroneous") notwithstanding the fact that the trial Judge did not examine the evidence and refused to grant to the petitioners a "hearing" as required under the Rule.

Petitioners filed a petition for rehearing after the rendition of the decision applying Rule 53 (e) 2. The petition for rehearing urged (R. II, p. 133):

> "The *per curiam* opinion *completely overlooked* the principal point on which the reversal was sought, namely, that the District Court *did not accord Appellants a hearing pursuant to Rule* 53 (e) 2. The findings, therefore, were *not* the 'concurrent findings of the District Judge and the Master' as stated in the opinion, but were *only* findings of a Master (*who was biased*) adopted *ex parte* by a Judge *without examining the evidence,* without hearing arguments and without affording the objectors the opportunity to be heard."

It was expressly pointed out in the petition (R. II 134):

> "The rule that a court of appeals will not disturb the *concurrent findings* of a Master and a Judge, is founded on the theory that 'appellant has had *two* chances and when two minds arrive at the same conclusion there is a strong presumption in favor of the correctness of the decision (*Thompson* v. *Smith*, 156 N. C. 345). It is inapplicable where *no such chance was had.* A Judge is not permitted to pass on objections to a Master's report in a perfunctory way but must use his own faculties and ascertain the truth."

The petition for rehearing further stated (R. II 135):

> "Appellant did not have the concurrent findings of a Master and a Judge, and the opinion is based on the misconception of the record. There is, therefore, *an apparent error of law which entered into the determination of the questions involved,* which this court overlooked, and a rehearing should be granted."

The petition further urged (R. II p. 135):

> "This Court affirmed the order below on the ground that 'no error of law affecting the determination of this controversy on appeal has been found.' It is evident that *the court entirely overlooked* Point I (b) of our Brief (p. 18) and the discussion thereof in the Reply (p. 13), which cited the Wisconsin case (232 Wis. 274, 294), on the point that *a "hearing" includes "oral argument".* We also cited the *Securities and Exchange Commission* case (84 F. (2d) 316, 318) on the point that the term 'hearing' presupposes a formal *proceeding 'upon notice' and on an opportunity to be heard.'* We also called attention to the fact that a "hearing" was fixed by the court originally and that thereafter the court entered an order *postponing the "hearing"* to be had upon due notice and that *no such notice was ever given and no hearing was ever had.* On the face of the record it appears there was an error of law and the statement of the court to the contrary is based on misconception of the record."

The petition for rehearing also urged (R. II p. 137):

> "We also urged in our Brief (p. 20) that the rule that the concurring findings of the Judge and Master is inapplicable to the instant case because *the findings in the instant case were not based on credibility of witnesses, but on inferences drawn from documentary proof,* and that the rule that a reviewing court will not disturb concurrent findings, is inapplicable to the instant case. We cited in our Reply Brief (p. 13) the decisions of this court sustaining our contention. Without noticing this distinction, this court based its opinion on the rule which is inapplicable to this case."

It is also stated in the petition for rehearing (R. II p. 138):

> "In order to constitute concurrent findings, it is necessary that the Judge afford an opportunity to the objectors to be present in court and to be heard on the objections, to present their argument, and it is necessary for the court to examine the evidence, all of which was not done in the instant case. There was, therefore, no concurrent findings, and the opinion is based on a misconception of the record."

The court thereafter denied a rehearing, without any opinion (R. II p. 143).

THE QUESTIONS PRESENTED.

The petition presents the following questions for the consideration of the Court:

1. Whether Rule 53 (e) 2 was mandatory on the District Court, and whether it was proper for the Judge to pass on the objections in the face of a demand for a hearing, and the propriety of the action of the Court of Appeals in affirming the judgment on the ground that Rule 53 (e) 2 required such affirmance.

2. May a decision of a Judge (in ruling on objections to a special Master's report involving examination of evidence) be sustained on the theory that Rule 53 (e) 2 required an affirmance unless the judgment was "clearly erroneous", when the Judge failed to accord the objectors an opportunity to be "heard", to examine the evidence, and abdicated his function in favor of the judgment of the special Master, on the ground that the Master was better able to judge the subject-matter than he, the Judge?

3. Whether the findings of the special Master that petitioners were not entitled to any compensation for certain services rendered to the estate (which included the elimination of two claims in excess of $10,250,000.00) were supported by any evidence, and whether Rule 53 (e) 2 was properly applied to a case where the findings were not based on controversial matters, but merely on deductions and inferences from uncontroverted evidence.

4. Whether the report of a biased Master, which was approved by a Judge, without notice, without hearing, and without examination of evidence, may be affirmed by reason of Rule 53 (e) 2.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The construction of Rules 52 (a) and 53 (e) 2 involves important questions of Federal Procedure, and deserves the exercise of the discretionary power of this Court to issue the writ (*R. F. C.* v. *Bankers Trust Co.*, 318 U. S. 163, 166).

2. The question whether the words "notice" and "hearings" under Rule 53 (e) 2 includes an opportunity to be present in court, to present the evidence in support

of the objections, argument of counsel, and to have notice and opportunity to be heard, as contended by the petitioners, or whether the word "hearing" only means a reading of the report and objections, and the affirmance thereof on the ground that a special Master was better able to judge than the Judge, constitutes the "hearing" contemplated under that rule (as determined by the Circuit Court of Appeals) is an important question which deserves the issuance of the writ to review the decision.

The word "hearing" includes "oral argument" (*State* v. *Millohols*, 195 N. W. 292, 295 (N. D.); *Denver & R. G. W. R. Co.*, 32 F. Supp. 244, 245; *Securities and Exchange Commission*, 84 F. (2d) 316, 318; *Harrison* v. *Commissioner of Internal Revenue*, 107 F. (2d) 341).

The decision of the Sixth Circuit which affirmed the judgment below when the court failed to comply with Rule 53 (e) 2 in relation to the failure to give notice, the absence of a motion and failure to accord the petitioners the opportunity to be heard, is in conflict with the decision of the Eighth Circuit (*Ettman* v. *Federal Life Ins. Co.*, 137 F. (2d) 121), which held that the Federal rules of Civil Procedure govern pleadings, practice, and procedure in courts of the United States, and that these rules contemplate a trial on the merits in accordance with the evidence and applicable law. It is contrary to the decision in *Rosenberg* v. *Heffron*, 131 F. (2d) 80, which held that Rule 53 (e) 2 is applicable to bankruptcy cases.

While none of these cases deal with Rule 53 (e) 2, we believe that the construction of the word "hearing" as applied to general equity cases, is equally applicable to Rule 53 (e) 2. In *Re Denver supra* the court defines the term "hearing" in bankruptcy to include "notice" and "argument of counsel" to meet the test of "due process".

3. The question whether Rule 53 (e) 2 may be applied to a case where the Court adopted the findings of a special Master without examining the evidence and without affording the petitioners an opportunity to present the record in support of the objections is of utmost importance in the administration of Federal Procedure and the writ should be issued.

PRAYER FOR RELIEF.

WHEREFORE, the above petitioners by their counsel PRAY the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that the judgment may be reversed, and for such other relief as to the Court may seem fit.

MEYER ABRAMS,
HARRY J. MYERSON,
FANNIE B. STERN, Executrix of the Estate of Joseph L. Stern, Deceased.

By MEYER ABRAMS,
HARRY J. MYERSON,
H. WALTER STEWART,
Their Counsel.

October 4, 1943.

SHULMAN, SHULMAN & ABRAMS,
134 North LaSalle Street,
Chicago, Illinois

HARRY J. MYERSON,
10 South LaSalle Street,
Chicago, Illinois,

THOMPSON, HINE & FLORY,
Guardian Building,
Cleveland, Ohio.
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

A.

JURISDICTION INVOKED.

The jurisdiction of this Court to grant the Writ is invoked under 240 (a) of the Judicial Code as amended by the Act of November 13, 1925 (42 Stat. 1938, 28th U. S. C. A. § 47). The judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the decision below was rendered May 31, 1943 (R. II, p. 132) and was made final by the denial of the rehearing on August 31, 1943 (R. II, p. 143). The petition is filed within the statutory period.

B.

OPINIONS BELOW.

The opinion below of the District Court is not published and appears in the printed record (R. I, p. 705). The opinion of the Court of Appeals is published in the Advance Sheets of the Federal Reporter (136 F. (2d) 537), and appears in the record (R. II, p. 132).

C.

ARGUMENT.

A STATEMENT OF THE CASE.

Petitioners are attorneys for a group of creditors known as "Gochenour, *et al.*," who performed services from 1936 to 1942 in connection with the reorganization of the Cleveland Terminals Building Company under § 77-B of the Bankruptcy Act involving property of approximately $400,000,000.00. The services included the elimination of two claims held by the "parent" and another affiliated corporation in excess of $10,000,000.00, opposition to certain plans, and participation in the approval of the final Plan.

The petition for fees was referred to a Special Master together with other petitions, who recommended the allowance of $18,000.00 for certain of the services to the estate, and a denial of any compensation for the other services rendered. No appeal was prosecuted from the allowance of the $18,000.00 for the services for which the Master recommended the compensation, although the Master did not recommend the full amount requested. The appeal was only taken and allowed (R. I, pp. 1-2) from that portion of the Master's recommendation which was approved by the Court, denying *any* compensation for certain of the services rendered to the estate.

The Petition was divided into two parts: (a) services relating to administrative matters, inter-relationship of Parent and Subsidiary and their dominant officers, segre-

gation of funds, and reorganization plans (R. I, pp. 5-15), and (b) services concerning elimination of claims in excess of $19,000,000.00 (R. I, pp. 16-22).

Service for Which Allowance Was Made. The major part of the services performed by petitioners for which the $18,000.00 allowance was made, was their objections to the Morgan claims, which resulted in a reduction of approximately $6,000,000 from the claim as a result of a reversal of the Master and the District Court (*Gochenour, et al.* v. *J. P. Morgan & Co.*, 111 F. (2d) 378). Due to the fact that the appeal was not taken from the allowance, but merely from the *disallowance* (R. I, pp. 1-2), this subject-matter is not involved on this petition.

Service for Which No Allowance Was Made. The Debtor filed a claim for $10,272,146.00 for interest on its open acccount against the Subsidiary (R. I, p. 19). The total claim aggregated in excess of $37,000,000.00. Another claim was filed by the Terminal Company, a subsidiary, for principal and interest. Both claims were contested as to principal and interest by the petitioners, and was contested as to interest only by J. P. Morgan & Co.

The Trustees of the Debtor, who were "special counsel" in one capacity and "supervisors" of the Subsidiary in another capacity, sought to enforce the entire claim of $37,000,000.00 against the Subsidiary (R. I, p. 20). Petitioners proceeded with their objections to trial, offered evidence (R. 20) and filed a Brief (R. 21, 111), contending (a) that the entire claim was void because of the relationship of "parent" and "subsidiary" and (b) that under no theory could the "parent" collect interest from its subsidiary in the sum of $10,272,146.00.

The Master sustained their objections as well as the objections of Morgan's claim for interest (R. I, pp. 21, 301). In his report he relied on the objections and evidence of the petitioners (R. I, pp. 297-298). The trustees for the Debtor filed objections to his report, supported by Brief urging the allowance of the entire claim against the Subsidiary whose "supervisors" they were. The petitioners filed their Brief (R. I, p. 114) seeking to sustain the Master's report eliminating this claim. The District Court overruled the objections and sustained the petitioners and Morgan by eliminating the claim of $10,272,146.00 (R. I, p. 177).

Another affiliated Company, the Terminal Buildings Company, filed a claim for principal in excess of $1,500,000.00, and for interest in excess of $53,000.00 (R. I, p. 16). Petitioners filed similar objections as to the parent's claim, and performed similar services. The Master sustained them by eliminating the claim for $55,645.33 (R. I, p. 305), and the Court approved his report (R. I, p. 310).

No compensation was allowed for the services rendered by petitioners in eliminating these two claims in excess of $10,000,000.00.

No compensation was allowed for any of the services in the field of administration and in connection with the reorganization plans.

Services in the Field of Administration: Petitioners appeared before the Special Master on November 13, 1936, on the hearing on the question whether the Debtor and Subsidiary Debtor should remain in possession after the approval of their joint petition under § 77-B as filed in good faith. Petitioners opposed the continued possession of the Debtor and Subsidiary Debtor in possession and

urged the appointment of trustees on the ground of the adverse interests of the "parent" and its "subsidiary", who were controlled by the same persons who dominated them. They also urged the rejection and cancellation of a lease to the Chamber of Commerce for 10% of the entire area of the mortgaged premises on a percentage basis, which had been operated at a loss of approximately $25,-000 per year. At the conclusion of the hearing, the Master requested written briefs, which were filed by the petitioners (R. I, p. 72). The Master found (R. I, p. 224) that the interests of the Debtor and its Subsidiary, were dominated by the same officers and were *adverse*. Instead of recommending the appointment of trustees for the Subsidiary, the operating company, he recommended the appointment of trustees for the "parent", which was simply a "holding" company (R. I, p. 225).

Petitioners filed objections to that part of the report which recommended that the possession of the subsidiary debtor be not disturbed (R. I, p. 85) supported by a Brief (R. I, p. 88). The Court held the matter under advisement, and on February 5, 1937, it rendered its opinion sustaining the Master's report as to the appointment of trustees for the Debtor, and reserved jurisdiction to further consider the exceptions to his report as to the Subsidiary Debtor (R. I, p. 229). On February 8, 1937 the Court appointed Messrs. Lecke and Fogg as trustees for the Debtor, with power to act as their own counsel (R. I, p. 227), and on May 21, 1937, he overruled the objections *"without prejudice"* or further consideration if, upon a further showing, it would be necessary to appoint trustees (R.. I, p. 227).

Petitioners made a further showing on June 12, 1937 (R. I, p. 272) for the appointment of trustees of the Subsidiary Debtor. On July 14, 1937, the Court appointed "special counsel" for the Subsidiary as a "cure" to the adverse interests (R. I, p. 230).

On August 6, 1937, petitioners obtained leave to file objections to claims aggregating $85,000,000.00, the major part of which were filed by affiliated companies who were controlled by the same officers (R. I, p. 121). After granting such leave the Master appointed "special counsel" on August 10, 1937, to contest some of the claims. However, they filed no objections, nor did they contest any of the claims, until petitioners proceeded with the evidence in connection with the objections to the claim of J. P. Morgan & Co. Thereafter, "special counsel" adopted substantially petitioners' objections, and the Master stayed further hearings on petitioners' objections, with the right to them to participate in the suggestions and argument (R. I, p. 100).

The special Master finally recommended the appointment of the trustees for the Subsidiary Debtor on June 26, 1938 (R. I, p. 230). The Court, however, did not follow his recommendation, but added to the duties of the "trustees" for the "parent" and "special counsel" the further duty of "supervisors" for the Subsidiary, relieving them however from any duty concerning contest on claims or Reorganization Plans (R. I, p. 235).

Services in Field of Reorganization. On May 18, 1937, Debtor and Subsidiary filed a joint plan (R. I, p. 256), proposing to give to the leasehold bond owners in exchange for their principal debt of $6,000,000.00, plus accrued interest at 6% from June, 1932, Preferred stock in a corporation which was to acquire the mortgaged premises, and the Subsidiary was to be released from all its liabilities, thereby making all other assets free from the debt and the management of the property was to remain in the control of the same persons.

Petitioners filed objections to such plan on June 12, 1937 (R. I, pp. 10, 272), which objections were made

available to all creditors (R. I, pp. 12, 13). They also filed amended objections and proposed suggestions or amendments to the Plan, on August 6, 1937 (R. I, pp. 10, 11). Among the objections they urged (R. I, p. 11) that it would be inequitable to release the Subsidiary from its personal obligation of $6,000,000.00 on the bond issue, because the mortgaged premises were valued at less than the bond issue, and therefore it was improper to exclude the bond owners from their position as general creditors for the difference between the value of the mortgaged premises and the amount of their debt. They also objected on the ground that the $85,000,000.00 in claims, which were to be taken care of under that Plan, were held by affiliated Companies, and that the claims should be subject to careful scrutiny before giving them any participation under the Plan.

Petitioners suggested amendments to the Plan on June 12, 1937 (R. I, p. 275) and in the amended suggestion of August 6, 1937 (R. I, p. 98) recommending (a) the appraisal of the entire estate of the Debtor and its Subsidiary; (b) the reduction of the bond issue by $3,000,000.00 by new securities secured by the mortgaged property; (c) the allowance of a general claim for the balance in excess of $3,000,000.00; (d) safeguards as to the control of the corporate affairs and (e) the appointment of trustees for the Subsidiary debtor. They further suggested amendments to the subsequent plan of 1938 (R. 12).

After making available the objections and amendments to all creditors, two committees were organized—one in New York and another in Michigan (R. I, p. 13), who later cooperated in bringing about the final Reorganization Plan. Thus, petitioners' suggestions found their way in the final plan whereby the Tower Building property (the mortgaged premises) was appraised at $3,000,000.00 (R. I, p. 13). The leasehold bond owners were allowed a general claim of $4,685,256.02 (R. 279).

Petitioners were active until the adoption of the final Plan, and joined in the last communication to the creditors with the committees, urging them to accept the final Plan (R. I, p. 313).

The Evidence. Petitioners filed a verified petition (R. I, p. 137) supported by 44 exhibits (R. I, pp. 28-115) which were received in evidence (R. I, p. 138). They also appeared as witnesses and were cross-examined at length (R. I, pp. 117, 165). No evidence was offered in opposition to the application for fees, and the evidence is primarily based on documentary proof.

To support the claim for services rendered in the field of administration, there is the transcript of the proceedings (R. I, p. 226), the Brief which was filed with the Master (R. I, p. 72) and the Brief which was filed with the Court (R. I, p. 88), pointing out the adverse interests and the necessity for the appointment of independent trustees and counsel. In connection with segregation of certain funds, for which petitioners claimed compensation and which was not allowed them, there appears in the record their petition for segregation (R. I, p. 239). The services relating to the elimination of the two claims in excess of $10,000,000.00, are reflected by the two claims (R. I, pp. 103, 107), the Master's report relating to such claims (R. I, pp. 295, 305), and the order of the Court sustaining petitioner's objections thereto (R. I, pp. 303, 308).

The services relating to the objections to the Reorganization Plans appear from reading the objections of June 12, 1937 (R. I, p. 272), the amended objections and suggestions for modification of August 6, 1937 (R. I, p. 98), and from the suggestions for the modification of the 1938 Plan (R. I, p. 12).

The Report: After finding that petitioners performed certain services for which there was recommended an allowance of $18,000.00, the Master found that for the other services, petitioners were not entitled to *any* compensation. He stated in his report that petitioners made no contribution to any of the administrative matters (R. I, p. 180); that the elimination of the two claims in excess of $10,000,000.00 was not the result of petitioners' efforts (R. I, pp. 187, 188), and that petitioners did not contribute anything to the final Plan (R. I, p. 188); that the segregation of funds did not result from points urged by the petitioners (R. I, p. 187).

These findings were based on his inferences and deductions from the documentary proof and from his alleged knowledge of the debtor's affairs during the past six years when he served as special Master.

The Exceptions: Petitioners filed objections to his report (R. I, pp. 192-204). Among the objections they urged that the Master considered evidence which was not adduced at the hearing; that there was no foundation in the evidence to sustain his findings, and that his findings were contrary to the evidence, and that the Master was biased.

The Ruling of the Judge. The Judge did not examine any of the evidence, afforded no opportunity to the petitioners to have their day in court to support their objections by evidence or argument. He held that the special Master was better able to judge upon the allowance of the compensation than he, the Judge, and therefore adopted the Master's report. He even followed the Master's report in recommending only part of the refund of the expenses, notwithstanding the recommendation of the Securities Exchange Commission to refund all of the expenses (R. I, pp. 205-207).

The Errors: The Court of Appeals erred in sustaining the decision below on the ground that Rule 53 (e) 2 required it to confirm his order unless it was "clearly erroneous", when it appeared that the Court **did not afford the petitioners a hearing** as required under the Rule and that it abdicated its function in favor of the special Master.

The undenied proof demonstrates that petitioners performed valuable services to the estate, which was of great benefit to it; and if the Court had examined the evidence and afforded petitioners an opportunity to present their argument, supported by the evidence, it would have been forced to reject the Master's report, and the Circuit Court of Appeals erred in applying the Rule 53 (e) 2 to such a case.

I.

The Approval of the Master's Report Without Notice and Without a Hearing As Required By Rule 53 (e) 2 Required a Reversal of the Order Overruling the Objections, and to Sustain the Objections.

The Circuit Court of Appeals applied, on the one hand, one part of Rule 53 (e) 2* which authorized the Court to accept "the master's findings of fact unless clearly erroneous", and, on the other hand, overlooked the other part of the rule which requires a "motion", "notice" and a "hearing".

---

* Rule 53 (e) 2 is as follows:

"In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous. * * * Application to the court for action upon the report and upon the objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court **after hearing** may adopt the report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions."

In the instant case there was a total noncompliance with the Rule. There was no motion, no notice, and no hearing. This, in spite of the *demand for a hearing* on the face of the objections (R. I, p. 204), and on the face of the Brief (R. I, p. 204), and in violation of the order of court of June 1, 1942, which stated that *a hearing would be set on due notice.*

Both Rules 52 (a) and 53 (e) 2 are expressly made to be applicable to Bankruptcy (*Perry* v. *Baumann,* 122 F. (2d) 409. These rules are *mandatory* upon the District Court (*Shannon* v. *Retail Clerks Int. P. Ass'n,* 128 F. (2d) 553, 555). In addition to Rule 53 (e) 2, order No. 47 in Bankruptcy provides that "the Judge after *hearing* may adopt the report or modify it." There was no notice, no motion and no hearing, and therefore the District Court was without power to adopt the Master's report, and it became the duty of the Court of Appeals to reverse its order. This was urged in the reply brief and in the petition for reeharing.

The term "hearing" presupposes proceedings "upon notice" (*In re Securities and Exchange Commission,* 84 Fed. (2d) 316, 318). A "hearing" is an "equity term" and is properly "applied to the argument" (*Miller* v. *Tobin,* 18 Fed. 609, 616). It includes "the testimony and the argument" (*West Chicago Park Commissioners* v. *Riddle,* 151 Ill. 487). The term "hearing" includes "argument" (*Harrison* v. *Commissioner of Internal Revenue,* 107 F. (2d) 341, 342).

Petitioners stated in the petition for rehearing under the heading "Denial of Hearing" (R. II, p. 135):

> This court affirmed the order below on the ground that "no error of law affecting the determination

of this controversy on appeal has been found". It is evident that *the court entirely overlooked* Point I (b) of our Brief (p. 18) and the discussion thereof in the Reply (p. 13), which cited the Wisconsin case (232 Wis. 274, 294), on the point that the term "hearing" *presupposes a formal proceeding* "upon notice" and an opportunity "to be heard". We also called attention to the fact that a "hearing" *was fixed originally* and that thereafter the court entered an order *postponing* the "hearing" to be had upon *due notice* and that *no such notice was ever given and no hearing was ever had.*

The petition also stated (R. II, p. 136):

> On the face of the record *it appears that there was an error of law* and the statement of the court to the contrary is based on a misconception of the record. In addition to the cases cited in the Brief and Reply, we desire to call attention to the *requirement* of Rule 53 (e) 2 for "notice" and opportunity to be "heard" and that failure to give "notice" and afford an opportunity to be "heard" is *not due process.* "Argument of counsel" is embraced in the term "hearing" and "due process". (*Re Denver R. Co.*, 32 F. Supp. 234, 235.)

The petition further urged (R. II, p. 136):

> The construction of the term "hearing" and "notice" came up before this court in *Harrison* v. *Commissioner of Internal Revenue,* 107 F. (2d) 341. *This court there held that oral "argument" of counsel was included in the term "hearing".* This court reversed the decision below for non-compliance with statutory "notice" and an opportunity to be "heard", notwithstanding the fact that the trial court did receive the memorandum of law from respective counsel. There, no demand for argument and hearing was made, while here *such a demand was made and refused.* The word "hearing" contemplates an opportunity to be "heard" not only to be "present" but also "the right to present one's

contention, and to support the same by proof and argument. *State* v. *Millhols,* 195 N. W. 292, 295 (N. D.)."

It was the duty of the Court of Appeals to grant the rehearing when its attention was called to the violation of the Mandatory Rule.

II.

The District Court Was Required to Examine the Evidence on Ruling on the Objections Which Were Based on the Contention That There Was No Evidence to Support the Master's Findings. It was the Duty of the Court of Appeals to Reverse the Order, Which Was the Result of a Failure to Examine the Evidence and to Hear the Argument.

A reading of the opinion of the District Judge (R. I, p. 207) will be sufficient to convince this Court that the Judge did not examine the evidence. The objections specifically pointed out that there was no evidence to sustain the Master's findings (R. I, p. 192). Where the objections challenged the sufficiency of the evidence to support the findings, the court is duty-bound to examine the evidence and to afford the objector the opportunity to show by the evidence that the objections were well founded. (*Foote Bros.* v. *National Land Bank,* 114 F. (2d) 611, 621; *Holt* v. *Johnson,* 128 N. C. 67; *Jones* v. *Van Horn,* 28 Colo. 127.) This alone required a reversal of the order.

III.

The Findings Were Contrary to the Uncontroverted Evidence, and the Circuit Court of Appeals Clearly Erred in Not Reversing the Order Sustaining the Master's Report.

The Special Master discussed the services which were outlined in the petition under sub-headings 1 to 7. We will not discuss all of these sub-headings, as it is sufficient to illustrate that he clearly erred as to some of these matters and that we are entitled to a reversal on the merits. Upon the allowance of the writ, we will discuss the other phases.

Administrative Matters: In discussing the point concerning the services relating to administrative matters under the heading:

> **"1. The Administration of the Estate Received the Benefit of Independent Supervision Under the Orders of the Court"**

the Master says (R. I, p. 180), that the statement that petitioners' efforts contributed to the benefits resulting from independent supervision, is "untrue". According to him, petitioners were not entitled to *any* compensation for the appointment of the Trustees for the Debtor, because their clients were neither stockholders nor creditors of the Debtor, but of the Subsidiary (R. I, p. 181). The Subsidiary was a mere *adjunct* of the Debtor, and the creditors of the subsidiary were vitally affected by *their joint Reorganization Plan*, whereby the Debtor would have received a part of the assets available to the creditors of the Subsidiary in payment of the Debtor's claim in excess of $37,000,000.00 against the Subsidiary.

The Master held that petitioners were not entitled to any compensation because their efforts did not contribute to the appointment of Trustees for the Debtor and independent counsel and supervisors for the Subsidiary (R. I, pp. 72, 75). This is refuted by the transcript of the proceedings of November 13, 1936 (R. I, p. 236), the brief filed with the Master (R. I, p. 75) and by the brief filed with the court.

Point I of the brief pointed out (R. I. p. 75)* that the Debtor and Subsidiary Debtor and their officers and managers were disqualified because of their adverse interest and that it was necessary to appoint impartial Trustees for the protection of the creditors.

Under subdivision (a) the attention of the Master was called (R. I, p. 79) to *the violation of the cardinal rule that one may not serve two masters.* Many authorities were cited on the duty of the court of bankruptcy to appoint independent Trustees and disinterested counsel when it appeared that the interest of the dominant stockholders and officers were adverse. It pointed out that after they succeeded in carrying out the voluntary plan of 1932 whereby the *fixed* interest and *sinking* fund requirements were *abolished* and the Subsidiary Debtor was permitted to operate the premises and apply the *net* income in payment of interest, *they so mismanaged the affairs that not one cent was distributed from June,* 1932, *to the date of the hearing—November* 13, 1936. During the entire period all that there was available for the application of the net income was $750.00. The brief pointed out that this was *not due to lack of income* but to

* The printed record does not contain the whole brief but merely an outline, but the entire brief was filed as an exhibit and the Court of Appeals authorized the printing of portions of the record (R. II, p. 131).

bad management because of the reductions in leases and failure to collect from affiliated companies. The brief stated (R. I, p. 79):

> "A glance at the directorate of the Debtor and of the Subsidiary Debtor will disclose that they were substantially the same. The Debtor is the sole owner of the Subsidiary Debtor; was interested in allowing its other subsidiaries, Vaness and Higbee, to remain in possession and pay as little as possible after they arranged to pay the bondholders from the net income, if any. They so managed the affairs that there was indeed no net income."

Petitioners asked (R. 79):

> "Should such persons, who so betrayed the interest of the investors and who mismanaged the properties to their own advantage, be further permitted to continue in operation?"

The question suggested the answer that a Trustee should have been appointed.

Point II of the brief (R. 80) discussed the testimony of Vice President Sharpe, who was managing the property. It called the attention of the Master to the fact that "*this manager who collected from the Vaness Company whatever amount he was told to collect by his superior, Bradley, without regard to written lease,* evaded giving proper answers to questions and at first gave the impression that the rental for the Higbee lease was $115,180.68, but *after further cross-examination he confessed that the rental was* $144,055, *but he accepted an annual rental of* $119,480.05". An examination of the brief will lead to no other conclusion than *that petitioners were the only attorneys who disclosed the impropriety of retaining the Debtor in possession,* and the necessity for the appointment of disinterested trustees.

The Master *did not simply recommend that the Subsidiary Debtor remain in possession, as he now states* (R. I, p. 181). His report, which he *then* filed, shows *differently.* There, he stated (R. I, p. 227) that the Debtor was a substantial creditor of the Subsidiary Debtor and was in turn owned by the Vaness Company, who was, in turn, controlled by the same persons who dominated all of the companies. He concluded:

> "The interests of said Debtor are adverse to the interest of Subsidiary Debtor and that said adverse interests are herein represented by the same persons."

These findings and recommendations were the result of petitioners' efforts, their examination and cross-examination of the witnesses, the evidence they produced, the oral argument presented, and the brief which they filed (R. I, pp. 72-84).

Notwithstanding the introduction of the foregoing the Master did not recommend the appointment of Trustees for the Subsidiary. He found a different remedy—the appointment of Trustees for the "Parent".

The recommendation to appoint the Trustees for the Debtor and "disinterested counsel" in order to sever the adverse interests resulted directly from the petitioners' efforts. These Trustees were appointed as their own counsel. *Their services evidently benefited the estate* as the *Master recommended paying them* $32,500.00 for supervision (R. I, p. 171), $12,500.00 as their own counsel (R. I, p. 172), $25,000.00 as counsel for the Subsidiary Debtor (R. I, p. 173).

Were petitioners not entitled to *any* compensation because the Master adopted a different expedient from that

which was advocated by the petitioners? It was their position that the appointment of Trustees *to merely hold the shares of the holding company in their portfolio did not cure the adverse position of the dominant officers who controlled the management company, the Subsidiary, which was in actual charge of operations.* They, therefore, filed in good faith, objections to that part of the report (R. I, pp. 85-87). *The court's attention was called to the mismanagement of the property by the officers and directors of the Subsidiary Debtor.* The objections referred to the testimony. It summarized the evidence and after pointing out these facts it was urged (R. I, p. 86):

> "The finding and recommendation of the Master that an order to sever the adverse interests of the parties it was necessary to appoint a Trustee of the Debtor and to be represented by independent counsel *called for a similar finding and recommendation to appoint a Trustee for the Subsidiary Debtor for the reason that all of the tangible property is in the possession and control of the Subsidiary Debtor."*

In his report recommending the appointment of the Trustees for the "Parent", the Master was "careful" to state that his report was not predicated upon *"the slightest shadow of a doubt as to the good faith and intentions of such officers"* (R. I, p. 227), notwithstanding the transcript of the testimony and the Brief of Appellants which he returned therewith. A specific objection was filed in court to that statement (R. I, p. 87) supported by a brief (R. I, p. 88). *This statement of the Master has since been proven erroneous.* The court found *fraud* to exist relating to the $5,000,000.00 transaction when it reversed the same Master and the Court (*Gochenour* v. *J. P. Morgan, et al.*, 111 F. (2) 378). *The fraud was committed by the same persons whom the Master found to have*

acted in good faith. The fraud in the formation of the Midamerica and in the purchase of the assets in the Morgan sale (*Re Van Sweringen,* 119 F. (2) p. 213) *was also committed by the same persons,* against whom the Master said there was not "the slightest shadow of a doubt" as to their "good faith". See also *Gochenour* v. *Cleveland Terminal Bldg. Co.,* 118 F. (2d) 89.

The District Court did *not* brush aside these objections summarily. It gave consideration to the objections and to the brief (R. I, p. 229). It held the matter under *advisement* until May 21, 1937, and its memorandum opinion indicates (R. I, p. 230) that *it gave some thought to these objections* and that *its finding did not coincide with the Master's views* that the dominant officers of the Vaness, the Van Sweringen Corporation and the Cleveland Terminals Building Corporation always acted in good faith and that there was not the "slightest shadow of a doubt" as to their actions. The District Court stated in its memorandum of February 5, 1937 (R. I, p. 229):

> "That *inter-company relationship* is of such character as to make certain of the interests between the two Debtors *adverse to one another,* and that *orderly administration requires the appointment of officers by the court to control and represent the interest of the principal Debtor,* both in respect to its liability to the parent company and *its claims against the Subsidiary Debtor.*" (Emphasis ours.)

The court did *not* overrule the objections to the Report at that time but, on the contrary, *it reserved its ruling for further consideration* when it appointed Frederick L. Leckie and Joseph G. Fogg, as Trustees for the Parent with power to act as their own counsel. Even in overruling the objections on May 21, 1937, *it stated that it was "without prejudice"* to further consideration by the

Special Master, "and if and when some further showing was made that would justify the appointment of a Trustee or Trustees for the Subsidiary Debtor" (R. I, p. 230). *Such a further showing was made by the petitioners,* as will now be demonstrated.

Notwithstanding the fact that the court appointed Messrs. Leckie and Fogg as Trustees of the Debtor in order to *sever the adverse interests* by its order of February 7, 1937, *the Debtor and Subsidiary Debtor adopted a joint reorganization plan dated May* 18, 1937, which was grossly unfair and inequitable. It should be noted that while the plan mentions that Messrs. Leckie and Fogg were appointed as Trustees for the Van Sweringen Corporation (R. I, p. 256) *their names do not appear as the persons who sponsored and adopted the plan.* The name of Barrett, as Vice President of the Van Sweringen Corporation the Parent, and of Bradley, as President of the Cleveland Terminals Building Company, the Subsidiary, are signed thereto (R. I, p. 258). *Where were the Trustees?* If the Trustees actually *superseded the dominant officers* and the adverse interest was *severed* it is not reflected in the Plan of May 18, 1937, which was issued *three months* after their appointment. *The Master permitted the mailing of the Plan and the solicitation of the consents thereto* (R. 269).* If the Master was able

* Under Section 77B or Chapter X a Special Master must report to the Court, which is to enter orders. (*In Re A. B. Co.,* 15 Fed. Supp. 152; *Garden City Canning Co.* v. *Addy,* 116 F. (2d) 137, 141; *In re Mofflein Chemical Corp.,* 123 F. (2d) 311, 313.) Here, the Master entered orders (R. 71, 100, 102, 218, 231, 243, 248, 269). He even entered an order on September 29, 1942, appointing "Special Counsel" on the appeal before the Circuit Court of Appeals (R. 310).

to learn all of the facts pertaining to the adverse interests of the parties, if he knew all of the principles of law involved, the authorities sustaining such principles, and did not need any aid of counsel, *he should have then known that this Plan was unfair,* and it was improper for the dominant officers whom he claimed to have removed by the appointment of Trustees to act on behalf of the "Parent". The contrary thereto appears from the fact that he ordered (R. I, p. 269) the printing of the Plan and permitted the solicitation of acceptances. He evidently did not know that the Plan was unfair as he permitted the two corporations to use the corporate funds in printing the documents and in soliciting the consents. That it was *not* obvious that the Plan was unfair also appears from the fact that *no steps were taken by the Trustees to prevent the plan.* Evidently they thought it was a fair Plan.

When this unfair Plan was permitted to be mailed out to all of the creditors in excess of 3,000 in number and without protest by the Trustees, and the solicitations to the Plan were sought, petitioners filed objections (R. I, p. 272) and informed all creditors of their position (R. I, pp. 153, 154). On the hearing pertaining to such Plan held before the Master on August 6, 1937, they filed amended objections (R. I, p. 94) pointing out the unfairness of this Plan, and further urged that a Trustee or Trustees should be appointed for the Cleveland Terminals Building Company "Subsidiary" with instructions to demand and procure an accounting from the corporate officers and directors and to take appropriate action against them for the protection of the rights of the bondholders of the Cleveland Terminals Building Company. We will discuss later the unfairness of the Plan which was sought to be put over on the investors. *It is sufficient*

here to point out that the remedy of the appointment of the Trustees for the Debtor did not work; that the adverse interest was not severed; that their appointment was forgotten when the Master permitted the mailing of the joint plan of the Debtor and its Subsidiary.

After this meeting of the creditors on August 6, 1937, when petitioners obtained leave from the Master to file objections to the various claims, the Master, of his own accord, saw fit to enter an order on August 10, 1937, to appoint "special counsel" to deal with *some* of the claims (R. 231). He based the order on the adverse interest of the parties. *Such adverse interest did not suddenly arise on August* 10, 1937. These claims were on file for many months.* *No one sought to disturb them.* It appears from the record that special counsel failed even to contest some of the claims, and their contest consisted of the adoption of the objections filed by the petitioners after all facts were disclosed to them by the statement of facts, which was made available to them and which appears among the 44 exhibits in the bound volume as Exhibit 7.

The Master says (R. I, p. 180) that on January 26, 1938, he recommended the appointment of Trustees for the Subsidiary Debtor, not because of anything that was urged by the appellants, but *because Bradley resigned as the principal officer.* Bradley's resignation should not have been the cause for the appointment of Trustees

---

* The claim of the Terminal Building Company was filed January 14, 1937 (R. I, p. 16). Another claim of $1,551,041.66 was filed January 14, 1937, to which appellants filed objections (R. I, p. 174). Special counsel who were appointed by the Master to contest this claim (R. I, p. 231) filed no objections but later asked for compensation (R. I, p. 174).

for the Subsidiary Debtor, for, by his resignation, the *adverse* interest was *diminished.* His resignation should not have suddenly caused the Master to recommend the appointment of Trustees for the Subsidiary Debtor. *It was because of the unfair plan which was sought to be put over and the criticism of the plan* in petitioners' objections which were made available to *all* creditors (R. I, p. 320), which was brought home to the Master. *Because of the demand for action against Bradley* and others, *they and their joint counsel stepped aside and resigned.* It was because of the intervening petition which petitioners filed with the Master on March 13, 1937, urging the appointment of Trustees for the Subsidiary Debtor (R. I, p. 239) and the amended petition of March 20, 1937 (R. I, p. 239), urging an accounting from the officers of the "Parent" and "Subsidiary" (which he held under advisement until June 4, 1937) and which report was not filed until 1941, that Bradley decided to resign.* It was because of the matters brought out by petitioners that the Master decided that he could hold out no longer and had to make the recommendation.

The court, however, *did not follow the Master's recommendation.* It added to the duties of Fogg and Leckie as Trustees and counsel for the Debtor, the further duty of "supervisors" for the Subsidiary Debtor (R. I, p. 236). This, the court said was not done because of the recommendation of the Master, but of the *court's "own motion"* (R. I, p. 235). It was evidently the result of the constant, persistent, continuous urging on the part of the petitioners which had become indelibly *imprinted in the mind of the court relating to the adverse interests*

* Bradley also withdrew a claim of $1,551,041.66 after petitioners filed objections to the claim (R. I, p. 174).

of the directors and officers and their mismanagement; the 1937 *unfair reorganization plan,* the objections thereto, and the *insistence of the appellants* to appoint trustees, and the activities of the petitioners in commencing action against the officers and directors of the Subsidiary Debtor, which moved the court to appoint "supervisors".*

The order of the District Court of February 1, 1938, clearly shows that the court *did not appoint the supervisors because of the Master's report* but *because of the persistence of the petitioners.* Its order states (R. I, p. 235) that "independently of said report" and *"for a reconsideration of the court's own motion"* of the "questions presented *at the time the petition* was filed herein as to whether a temporary Trustee or Trustees should be appointed, or whether the Subsidiary Debtor should be left in possession." It is apparent that the court's action was not based on the Master's report.

We have conclusively demonstrated by the record and exhibits that the Master's statement that petitioners "in no way" participated in the appointment of the Trustees for the Debtor and independent counsel and in the appointment of the "supervisors" for the Subsidiary Debtor *is contrary to the record* and is contrary to the facts.

---

* It should be noted that in its order the court stated that no one present before the court urged the appointment of Trustees (R. 236). It should be also noted that petitioners who insisted throughout the case for the appointment of the Trustees were excluded from the notice for the hearing (R. I, p. 235). The Master also failed to give notice to them (R. I, p. 233).

The Special Master's statement that petitioners made no contribution to the administration of the estate is also contradicted by the other reports which *he* filed. In one of these reports he referred to an action which petitioners commenced concerning the Higbee matter and that the action was no longer necessary because on or about December 15, 1938, counsel for the Subsidiary Debtor filed a proof of claim in the Higbee Reorganization (R. I, p. 252). The Higbee matter was called to his attention in November, 1936, and petitioners *sought greater relief* than the mere filing of a claim (R. I, pp. 73, 79). In the other report (R. I, p. 255) he referred to the relief sought by the petitioners pertaining to the Country Club's demand note of $1,112,000.00 (R. I, pp. 75, 79) that *"the matters set forth in subdivision "b" were examined into and resulted in realization of* $240,000.00 *for the benefit of the estate of the Subsidiary Debtor."** In that report he also refers to *another cause of action* which petitioners sponsored and the Master says (R. 255):

> "By order heretofore entered herein, the prosecution of any rights in favor of the Cleveland Terminals Building Company, as against the Higbee Company, were given consideration, and special counsel was appointed in 1938 to protect the interest of the Subsidiary Debtor in connection therewith."

It is true that almost in each instance after the petitioners brought out the facts and asked for the relief "special counsel" were designated. When they obtained leave to file objections to claims on August 6, 1937 (R. 19), the Master appointed special counsel (R. I, p. 231) and later stayed the proceedings on petitioner's objections (R. I, p. 100).

---

* The estate lost the difference between the $240,000.00 and the $1,112,000.00. See Brief in Support of Motion to Remove Debtor From Possession (R. I, p. 79).

A glance at the transcript of the hearing had November 13, 1936, long before the Adams application, will disclose that *appellants had brought out the facts relating to the Chamber of Commerce lease* and complained of the fact that the Chamber of Commerce was allowed to remain in possession at a loss to the estate ranging between $12,000.00 to $25,000.00 per year. *Petitioners then asked for the cancellation of the lease* which could have been cancelled by the Indenture Trustee if it had performed its duty or by a Trustee of the Subsidiary if a Trustee had been appointed (R. I, p. 75). The Master described it in his report of December 31, 1936 (R. I, p. 225), and conceded in that report that the Lease was one of the issues at that hearing. The Master says that petitioners had notice that the Adams Group *preceded* them by five days with an application. He refers to Exhibit 119 which is his report of June 4, 1937, which he did not file until 1941. The record *affirmatively* shows that *no notice was given* to petitioners (R. I, p. 238). We have already shown that the Gochenour intervening petition was verified February 24, 1937 (R. 239), which was prior to the petition of the Adams Group.

The question whether the cancellation of the lease resulted from petitioners' efforts or from the efforts of the Adams Group was a *factual* question. The Master had no right to "travel" *outside* of the record. Judicial notice "supplies facts" only when a *factual issue is raised at the hearing.* In the absence of such an issue by proper pleadings *there could be no judicial notice* as to what the Adams Group did. (*Missouri Utilities Co.* v. *City of California,* 14 F. Supp. 613.)

In discussing the point that petitioners were entitled to compensation for results obtained in procuring the segregation of the funds belonging to the mortgaged premises under the heading:

"3. Funds Belonging to the Tower Building Were Segregated",

the Master stated that this was "untrue". His mental attitude may be best illustrated by the fact that no such language was used when he found an incorrect statement of other counsel, particularly "special counsel". There he was polite, using the term (R. I, p. 17) "inadvertence". When petitioners applied for the segregation (R. I, ll. 243, 246) the Master resorted to every reason to deny the segregation, but when a similar application was thereafter made by the Mortgage Trustee (R. I, p. 247) all of his reasons vanished, the segregation was allowed and its counsel was rewarded with $5,000.00 for such efforts. The Master conceded (R. p. 183) that petitioners were first to seek relief. They, who initiated the proceedings to obtain the segregation which was followed by the Mortgage Trustee, were certainly entitled to some compensation.

In discussing petitioners' claim for compensation for their efforts to obtain the cancellation of the Chamber of Commerce lease under the heading:

"4. The Chamber of Commerce Lease of Over 10% of the Entire Space of the Entire Building Was Cancelled,"

the Master again used the words "not true" (R. I, p. 186). He gave the *sole* credit to counsel for the Adams Group and rewarded him $15,000.00 because he filed the application to cancel the lease on March 8, 1937, allegedly prior to the filing of the application by petitioners. The record shows that the petition was verified February 4, 1937 (R. 239), which antedated the filing date by the Adams Group. The Master also found another reason for the denial of any compensation, because he said that the lease was not canceled, but the

option for renewal was not exercised. It is significant that this was no obstacle for the reward to the Adams Group for such results (R. I, p. 178). That petitioners were first to urge the cancellation of this lease appears from the transcript of the evidence of November 13, 1936 (R. I, p. 75). It was discussed in the Master's report of December 31, 1936 (R. I, p. 235). It was urged in the brief which was filed with the Master and in the brief which was filed with the court. The statement of the Master that petitioners had notice of the application by the Adams Group five days before they filed their petition, is refuted by his own record (R. I, p. 238).

In analyzing and discussing the request for compensation for services rendered in procuring the abandonment of the 1937 and 1938 Plans under the heading:

"5. The Unfair Plans of Debtor and Subsidiary Debtor of 1937 and 1938 Were Rejected,"

the Master says (R. I, p. 187) that petitioners were not entitled to any compensation for rejecting the Debtor's plan, because their clients were not its creditors. He concedes that petitioners "strenuously opposed the 1937 Plan of subsidiary Debtor". This Plan was the *joint* plan of the Debtor and its Subsidiary, so that whether or not petitioners' clients were creditors of the Debtor or its Subsidiary, was of no consequence.

He also minimized the services performed in objecting to the Plan of the Subsidiary because the Committees also objected. The record shows that petitioners filed extensive objections to the Plan (R. I, pp. 272-275). None of the committees were in *existence* at that date, and they were formed as a result of these objections. They obtained the information from petitioners as a result of many conferences (R. I, pp. 148, 153, 154, 166, 320).

The statement of the Dunham Committee shows (R. I, p. 166) that its chairman conferred with petitioners after he received their objections (R. 320). They had several conferences with petitioners, which *resulted in the formation of the Committee,* and they considered "all material obtained" from "Gochenour objections". The Master conceded that this Committee performed valuable services when he allowed its counsel $15,000.00.

To deprive petitioners of the fruits of their labor, he credited the Dunham Committee with the rejection of the 1937 Plan. The objections to his report specifically raised this point (R. I, p. 198). Had the court granted the petitioners the opportunity to be "heard" under Rule 53 (e) 2 they would have produced the statement of this Committee in support of the objections, and the result might have been different. Had an opportunity been afforded, petitioners would have presented the communication of the Adams Group (R. I, pp. 318-320) which would have thrown a different light on the subject-matter, and the court might have reached a different conclusion. In the communication of the Adams Group sponsoring the 1937 Plan, they stated that "after mature deliberation" and in view of the selfish interests of a few bondholders "the interest of all bondholders can best be served by accepting the Plan of Reorganization at this time". This plan was later conceded by the Master to have been unfair; yet, counsel for this group was allowed $15,000.00, while petitioners were not allowed anything for the services rendered.

The entire theory of the Master that petitioners were not entitled to compensation for opposing the Debtor's plan because they were not its creditors, is *fallacious* for the reason that this was a *joint* plan of the Debtor and

its Subsidiary (R. I, p. 274). Petitioners, as creditors of the Subsidiary, were vitally interested in the Debtor's plan because under that plan property of the Subsidiary Debtor was to be released from the lien securing their debt and transferred to the creditors of the Debtor. The plan contemplated releasing the entire obligation of the $6,000,000.00 in bonds plus accrued interest in exchange for preferred stock in the Tower Building, which was later appraised by the same Special Master at $3,000,000.00. They were to receive the preferred stock in the corporation valued at $3,000,000.00 and they were to release *all of their claims for the balance of the debt of approximately* $4,600,000.00. All of the other assets of the Subsidiary were to be given to general creditors, whose claims aggregated approximately $85,000,000.00. The Gochenour Group, as leasehold bond owners, were interested in the rejection of that *joint* plan *because the leasehold bond owners were entitled to be general creditors of the Subsidiary to the extent of* $4,600,000.00 and to participate with the other general creditors. They were also entitled to participate in the rejection of many of the claims as they did, which reduced the claims to approximately $55,000,000.00.

The plan which the Master permitted to be submitted to the investors and to solicit consents thereto was *a very complicated one.* The Adams Group claimed a monopoly for the understanding of the plan and inferred that the Gochenour Group "only superficially examined the plan" and they *urged* the acceptance of the plan. If the plan was so plainly unfair the Master would not have permitted it to go out. He evidently must have thought it to be fair. Petitioners' objections *analyzed* the plan in plain words (R. I, pp. 272, 320) and *because of such objections the consents did not come forth.*

Contributions to Reorganization: In discussing the services performed by petitioners in obtaining the approval of the final Plan under the point:

"6. The Fair and Equitable Plan of 1940 Was Adopted,"

the Master disposes of the whole subject-matter by the single sentence:

> "The record shows no contribution offered by the petitioners to the Plan of Reorganization as Adopted."

The Master was required to make findings and not conclusions (*Hofer* v. *Corona Products, Inc.*, 121 F. (2d) 612).

While under Rule 52 (a) the court would be authorized to adopt the findings of the Master, it could not adopt this statement which was simply a conclusion. Under such circumstances the District Court was required to make its own finding under Rule 52 (a). *Kelly* v. *Drainage District*, 63 S. Ct. 1141, 1144. The Circuit Court of Appeals completely erred when it applied in one breath Rules 52 and 53 on the point that it would not disturb the concurrent findings unless "clearly erroneous", and at the same time *it failed to apply* the Rule which required "findings" and not "conclusions". Petitioners specifically urged this objection (R. I, p. 198). No opportunity was afforded them by the court to produce the evidence to refute the conclusion. Had the court afforded them the opportunity they would have presented to it the proposed amendments to the Plan (R. I, pp. 98, 272). In these proposed amendments, p,etitioners suggested the following:

(a) Appraisal should be made by direction and under the supervision of the court of all of the assets and property of the Debtor and Subsidiary Debtor including the leasehold estate of the Terminal Tower Building.

(b) The present first mortgage leasehold bonds on the Tower Building should be reduced to 50% of the appraised valuation of the Tower Building and for the balance of the 50% there should be delivered to the bondholders the securities to be issued under the plan and the bondholders should participate as general creditors with other creditors of the Subsidiary to the extent of the difference between the valuation of the leasehold property and the amount of their general claim.

(c) That the charter and by-laws of the reorganized company should be submitted to the court for its approval, including the election of its directors.

(d) That a Trustee or Trustees should be appointed for the Subsidiary Debtor with instructions to demand an accounting of all officers and directors and to take appropriate actions against all persons, firms or corporations for the protection of the rights of the bondholders.

The insistence on the appraisal was repeated on April 23, 1938, when the 1938 plan was submitted by the Debtor, the Subsidiary Debtor, the "supervisors" and the two committees (R. I, p. 12). It is significant to note that while the 1938 plan which the Master found on May 20, 1940, to be unfair (R. I, p. 280) was sponsored by *all* of the parties who recommended it as fair and urged the filing of the acceptances (R. I, p. 278), *the Gochenour Group did not join in that communication.* The Gochenour Group *did however join in the communication for the acceptance of the final plan which was* approved by the court as fair and equitable (R. I, pp. 316-318). *This final plan of* 1940 (R. I, p. 279) *was based upon the original suggestions of the appellants to appraise the leasehold estate, to give to the bondholders security to the extent of the appraised value and to give them a general claim for the remainder of the debt.* The Special Master ordered an appraisal and the leasehold

estate was appraised on August 13, 1940, at $3,000,000 (R. I, p. 279), and he allowed to the bondholders a *general claim* in the amount of $4,685,256.02. It is evident that *petitioners' amendments were adopted and incorporated in the final plan* giving new securities to the bondholders to the extent of $3,000,000 and a general claim for $4,685,256.02 on the other property with other general creditors.

Nowhere in this record is there any evidence to support the Master's single sentence and nowhere is there any evidence in the record to contradict the foregoing evidence.

Elimination of Claims: In discussing the compensation for services performed in eliminating claims under the heading:

> **"7. Two claims aggregating $10,325,146 were eliminated,"**

the Master recommended the denial of any compensation on the ground (R. I, p. 189), that this was accomplished by J. P. Morgan & Co., and not by petitioners. He stated that petitioners objected to both, principal and interest, and Morgan only objected to the interest, and that petitioners' objections were overruled while Morgan's objections were sustained, and that petitioners' contribution "was of negligible value."

The record shows that petitioners filed objections to the Parent's claim of $37,357,755.44 on August 17, 1937. The first objection went to the *entire* claim (R. I, pp. 107-109) and the third objection raised the point that the Parent was not entitled to collect *any of the interest* which was included in that claim. After trying the case

before the Master by the introduction of evidence, petitioners filed a brief on April 12, 1938, consisting of 30 pages (R. 111). Point V of the brief was confined to the discussion that "the course of conduct of the parties precludes all right to recover interest" (R. I, p. 113). The "statement of facts" (R. I, p. 111) discusses the evidence which appellants submitted relating to the *interest. In the face of this record* the Master's statement that petitioners *did not offer any evidence as to the interest* and that their services with reference thereto was of *"negligible value"* is *unexplainable.* The interest proposition was discussed in the brief (R. I, p. 113). Messrs. Fogg and Leckie sought to establish the claim for interest in their brief and appellants filed a reply brief on May 19, 1938, consisting of 20 pages (R. I, p. 13). Point V of the reply brief *was devoted to a discussion of the interest* (R. I, p. 114). In rendering the report on this claim the Master did *not overrule the objections of the appellants on behalf of "Gochenour, et al.",* but, *on the contrary, he sustained their objections* as well as the objections of Morgan as to the interest (R. I, p. 301). *The statement of the Master that he overruled all of the objections of "Gochenour, et al." is simply not borne out by the record.*

The further statement (R. I, p. 189) that the disallowance of the Parent's claim against the Subsidiary for interest was the result of the attorneys for Morgan & Company and not because of any evidence or contribution of the appellants *is contradicted by his own report which he filed in court when he recommended the disallowance of the claim for interest.* In that report *he* referred to petitioners' evidence (R. I, p. 295). *He relied on the evidence of the petitioners* (R. 295, 297), on the point that there was to be no interest charge concerning the

open account. *He expressly referred to the evidence produced by the appellants on direct as well as on cross-examination.* His report concluded with the following (R. I, p. 301):

> "The objections of J. P. Morgan & Company *and A. B. Gochenour to the allowance of interest* upon the claim of Van Sweringen Corporation vs. The Cleveland Terminals Building Company *are sustained.* The claim of Van Sweringen Corporation for interest herein filed for the allowance in the assets of The Cleveland Terminals Building Company in the sum of $10,272,146.67 is disallowed."

This is what the Master said on November 14, 1939, and refutes his statement in this report (R. I, p. 189) that:

> "Hearings upon the matter of the objections to the allowance of interest were conducted *entirely* by counsel for J. P. Morgan & Company."

His statement (R. I, p. 189) that he only sustained the *objections of J. P. Morgan* to the allowance of interest, *which is contrary to his own report,* which "sustained" the objections of "Gochenour, *et al.*" *cannot be reconciled with the record.*

It is clearly obvious the statement was made solely for the purpose of depriving Petitioners of their fees in this regard.

If the opportunity to present the argument in court on the objections were afforded, we believe that the Court would not have sustained the Master as the order of the Court in disallowing the interest claim *expressly stated that it was entered upon the objections of J. P. Morgan & Company as well as upon the objections of "A. B. Gochenour, et al."* (R. I, pp. 303-304).

Petitioners were also entitled to compensation for their services relating to the opposition of the entire claim of the Parent against its wholly owned Subsidiary, even though they were only successful in eliminating the claim for interest. There was no Trustee appointed for the Subsidiary Debtor and the Parent's interests were adverse to the interest of that of the creditors. Because of its adverse interests, the Subsidiary Debtor filed no objections to the claim of the Parent. "Special counsel" failed to file any objections. The burden seemed to have been cast upon petitioners as creditors to contest the entire claim in the absence of a trustee and as a matter of fact the creditors' committees seemed to expect appellants to file objections and to follow through on behalf of all of the creditors.* A reference to the objections (R. I, pp. 107-109) and to the Brief (R. I, p. 111) and Reply Brief (R. I, p. 113) will disclose that *petitioners made a bona fide effort to eliminate the entire claim in excess of* $37,000,000. We are confident that had the *"Deep Rock"* case been decided earlier (*Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307), *the result would have been different* and the entire claim would have been eliminated. A mere glance at our brief (R. I, p. 111) and our reply brief (R. I, p. 113) and the Master's report in considering its issues (R. I, pp. 286-295) will be sufficient to convince this Court that *we were right in our contention that the entire claim should have been eliminated.* If an independent, impartial trustee had been appointed by the Court as was persistently and insistently requested by petitioners who would have contested this issue and who would have had funds available from the estate to carry on the contest on an appeal, the estate herein would have materially benefited by the

*None of the Committees participated in the hearings on the objections to claims.

disallowance of the entire claim. No individual creditor or even group of creditors are in position to appeal in each instance from erroneous rulings of a Master.

After the Master disallowed the claim for $10,172,140 Messrs. Leckie and Fogg, as Trustees for the Parent, filed objections to the report. Petitioners filed their brief on May 12, 1939, seeking to *uphold the Special Master* (R. 114-115). The Court overruled the objection and sustained the Master (R. I, p. 303). The statement of the Special Master that any contribution of the petitioners to the disallowance of the claims "was of negligible value" is, therefore, *not borne out by the record.*

"Special Counsel" appointed by the Court were attempting to obtain the allowance of fees for the elimination of this claim by their application No. 21. They sought $33,000 for certain services, and the Master allowed them $27,500. The Master, who, at every occasion, chose to use the word "untrue" when it came to petitioners' statement, he said (R. 177): "Probably through inadvertence counsel erroneously states" that they "objected to the allowance of interest upon the claim of the Van Sweringen Corporation" and "prosecuted said objections". *He says that the facts were that Morgan and Gochenour filed objections to principal and interest,* which objections were sustained and that Special Counsel "did not assist in any manner in the determination of said issue before the Special Master and did not participate in the hearings held before the Special Master."

The uncontradicted record is that petitioners objected to the interest; *they tried the case; filed briefs before the Master and filed a brief in court sustaining the Master's report.* The Court acted on the brief of petitioners as well as on the brief of Morgan. It entered the order sustaining the *joint* objections.

Petitioners also performed similar services in the elimination of a claim for interest in excess of $53,000. Here again the Master gave the entire credit to counsel for J. P. Morgan and stated that he overruled the objections of petitioners (R. I, p. 189). The record contradicts the Master's statement as he sustained the objections of A. B. Gochenour, *et al.* as well as the objections of J. P. Morgan & Company (R. I, p. 308) and the Court entered a similar order sustaining the *joint* objections (R. 309). When special counsel for the Subsidiary Debtor asked for compensation for the elimination of this claim the Master in recommending the denial of said compensation pointed out that *the Gochenour Group filed objections on August* 27, 1937, and that J. P. Morgan & Company filed objections *on March* 29, 1938 (R. 175), one day prior to the date *when the Gochenour objections were set for trial.* The Master stated in his report concerning this claim (R. I, p. 308):

> "Because of the close relationship of the various corporations involved in the transactions and in the interest of a close scrutiny in the details (deals) between the companies, the Special Master permitted Objector Gochenour upon his application to examine the books of CTB as to the transactions giving rise to this and other claims filed against CTB herein by former closely related companies."

Counsel for Gochenour did examine these books and records and prepared for the trial of the case (R. 33). *They performed their services in prosecuting the objections to the claim which included both principal and interest without anticipating that J. P. Morgan & Company would file objections and that the Master would set these objections one day ahead of the trial on the objections of Gochenour.* Now the Master says that inasmuch as Morgan tried the case a day earlier the petitioners are not entitled to compensation for their services.

We have already shown above that "special counsel" for the Subsidiary Debtor asked for compensation for the elimination of this claim and in denying such compensation the Master pointed out that A. B. Gochenour, *et al.* filed their objections in August, 1937 (R. 175) and that Morgan & Company filed objections in March, 1938, and that "special counsel" did not assist in any way in the hearings upon the objections. After the trial of the case petitioners filed an extensive brief with the Master, the outline of which appears in the printed record (R. I, p. 104), but the full brief appears in the bound volume. Point IV in that outline deals with the objections to interest. After the filing of this brief the claimant filed an extensive brief supporting the claim, and appellants filed a reply brief, an outline of which is in the printed record (R. I, p. 105) but the entire brief appears in the bound volume. When counsel for the claimant raised the point that "special counsel" for the Subsidiary Debtor did not oppose the claimant as to the principal a further memorandum brief was filed (R. p. 106). If "special counsel" had opposed the claim to the principal and perfected an appeal from an adverse ruling, we are certain that the claim would have been eliminated under the principle decided in the *Deep Rock* case. (*Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307, *supra.*)

IV.

The Affirmance of the Denial of the Reimbursement of a Part of the Expenses Cannot Be Sustained on Any Theory.

Petitioners asked for reimbursement of expenses aggregating $6,163.41, which included $1,797.50 for their accountants (R. I, p. 170). The Securities and Exchange Commission recommended the allowance of $5,339.51 (R.

II, p. 102). The Master only allowed $2,500.00, giving as his reason and of necessity some reason was required to be given by him that in a prior appeal taken by these petitioners in their objections to the Morgan claim (*Gochenour* v. *J. P. Morgan,* 111 F. (2d) 378, the Court of Appeals only allowed the reimbursement of 20% of the expenses. The application for the allowance of costs on appeal has no bearing on the issue of reimbursement for expenses in the reorganization plans. The issue on the allowance of costs on an appeal is an issue between an appellant and an appellee, while the issue for the reimbursement of expenses in reorganization is between the creditors and the estate. This court, in passing on the costs on an appeal, expressly held that this shall not prejudice the rights of the parties to seek reimbursement from the estate in the reorganization proceedings. (*Ecker* v. *Western Pacific R. R. Co.,* 318 U. S. 448, 510, 63 S. Ct. 692, 724).

The theory of the District Court which was affirmed by the Court of Appeals, that an appellant in a Reorganization proceeding who is compelled to appeal and only succeeds to recover 20% of the amount which he sought to recover, is only entitled to the reimbursement of the cost on appeal, to the extent of 20%, as was done in the previous appeal by these petitioners from the Morgan claim (*Gochenour* v. *Morgan & Co.,* 111 F. (2d) 378), and to apply this doctrine (R. II, p. 64) to deny the reimbursement of expenses to creditors on the theory that on the former appeal the Court of Appeals only allowed 20% of the reimbursement, is *contrary to the policy of Congress,* which is "paramount" to *encourage* "responsible creditor and Class participation in Reorganization" (*Re New York, N. H. R. Co.,* 46 F. Supp. 236, 240).

CONCLUSION.

We have shown above that the Master was biased; that the District Court did not afford the petitioners their "day in court," and that the Court of Appeals improperly construed and applied Rules 52 and 53. Therefore the petition for the writ of certiorari should be allowed.

Respectfully submitted,

MEYER ABRAMS,
HARRY J. MYERSON,
H. WALTER STEWART,
Counsel for Petitioners.